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In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS BRIEF OF IDRA IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Intercultural Development Research Association (IDRA). IDRA is an independent, non-profit organization that is dedicated to assuring educational opportunity and equity for every child. IDRA develops innovative research- and experience-based solutions and policies to assure that (1) all students have access to and succeed in high quality schools, (2) families and communities have a voice in transforming the educational institutions that serve their children, and (3) educators have access to integrated professional development that helps to solve problems, create solutions, and use best practices to educate all students to high standards. Since its founding in 1973, IDRA has also engaged in substantial PK-12 policy work both at the state and federal level, advocating for educational policies that help prepare students, especially minority and low income students, to graduate college- and career-ready. IDRA is a supporter of equitable channels that enable all students to overcome systemic barriers and enter the pipeline from PK-12 to higher education, including the Texas Top Ten Percent Law and the limited use of

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[1] Pursuant to Sup. Ct. R. 37.6, amicus note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to its preparation or submission. Petitioner and Respondents have consented to the filing of this brief through blanket consent letters filed with the Clerk's Office.

race in diversity admissions plans. IDRA previously submitted an amicus brief to the Fifth Circuit Court of Appeals in this case following remand to that court and files this separate brief to provide this Court with relevant and related information pertaining to the state of equity and opportunity in Texas' PK-12 system for minority students.

SUMMARY OF ARGUMENT

The Supreme Court has never held that a university's compelling interest in the benefits that flow from student diversity, including racial diversity, must be limited to a race-neutral percentage admissions plan as Petitioner asks in this case. Indeed, such an unreasonable ruling would run contrary to this Court's prior opinions where it has recognized that the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) ("*Fisher I*") (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978)). While the State of Texas' Top Ten Percent law (TTP) recognizes the value of a student having completed a rigorous high school core curriculum and ranking in the top ten percent of his or her graduating class in grade point average, and it has helped increase the number of African-American and Latino students into the University of Texas at Austin (UT), the law was never

intended to be the sole vehicle for expanding opportunities for Latino and African-American students and measuring their talents. And when the TTP law and UT's exhaustion of race neutral alternatives failed to yield a critical mass of Latino and African-American students based on its extensive review, UT was well within its right to add race as one of several factors in pursuing that critical mass through narrowly tailored means.

Based on IDRA's forty-plus years of experience in PK-12 education in Texas, the need for UT to consider race as a one of many "plus factors" for minority students[2] under its holistic admissions plan is especially important given Texas' sordid history of failing to adequately serve the needs of its minority students and recognizing those minority students who succeeded in spite of the educational barriers. It is equally important to recognize those minority students and other students who bring other individual characteristics that serve UT's broader interest in diversity.

Petitioner's suggestion that this Court should ignore the greater context of unequal educational opportunities for minority students in PK-12 public schools and focus instead on one output that disparately favors white applicants over minority students

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[2] For purposes of this brief, the term "minority" collectively refers to African-American and Latino students, unless otherwise stated. These are the underrepresented students of color targeted by Petitioner and are the two student groups who are primarily discussed in this brief.

– SAT scores – simply misses the mark. As further detailed below, while the State's role in perpetuating segregated schools for both Latino and African-American students is well-documented,[3] Texas has an equally notorious history of underfunding the education of its minority and poor public school students and failing to meet their educational needs in the classroom. All too often due to politics and power, Latino and African-American students find themselves shortchanged at the state level, the school district level, and even the school level. The unequal opportunities, coupled with disparate discipline referrals and student mobility impacting minority students at far greater rates than white[4] students, create an unfavorable learning environment for many minority students but also bring out the resilience in many others. Notwithstanding the significant barriers, many resourceful minority students persevere, achieve in the classroom, and apply to UT. These students deserve a fair chance of being admitted into UT as their race and racial experiences build their character, preparing them to engage in lively discussions and discourse in the university setting.

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[3] Arnoldo De León and Robert A. Calvert, *Civil Rights*, HANDBOOK OF TEXAS ONLINE (2013), http://www.tshaonline.org/handbook/online/articles/pkcfl (discussing several historical barriers erected against Latinos and African-Americans in the areas of education and voting, among other areas).

[4] For purposes of this brief, the descriptor "white" refers to "white non-Hispanic" and "Latino" refers to "Hispanic" students.

Furthermore, Petitioner's weak record supporting jurisdiction in this case fails to establish any traceable connection between her injury and the actions of UT challenged in this case should not continue. Unlike in *Bakke* and other quota cases, UT did not set aside any seats solely for minority students for which Petitioner was unable to compete. Here, the holistic admissions plan allowed all non-TTP students to compete for those few admission slots with race playing only part of a role in the holistic review of the entire application. Therefore, traditional standing principles should apply and Petitioner should not get a free pass to carry on this lawsuit. In fact, Petitioner's SAT score was 31 points *lower* than the average Latino SAT score for entering freshmen in 2008 and at least 100 white students entered UT with lower SAT scores than Petitioner. These facts show that UT's holistic admissions plan is working for all students. Affirming the Fifth Circuit's decision below will avoid allowing Petitioner to gut a university's complex decision in pursuing diversity through narrowly tailored means and will ensure the doors remain open for qualified African-American and Latino students through constitutional means. *See Fisher I*, 133 S. Ct. at 2418 (acknowledging complexities of admission decisions).

ARGUMENT

I. Texas PK-12 Public Schools Reflect a Dynamic, Changing Student Population, Yet the Pipeline to UT Still Proves Difficult for Latino and African-American Students

As this Court has recognized, UT is one of the Nation's leading institutions of higher education. *Fisher I*, 133 S. Ct. at 2415. It is a major pipeline for leading and prestigious careers in both the private and public sectors and is sought out by nearly thirty thousand students applying for a coveted position in the freshman class.[5] The competition has become more fierce in recent years as the number of public school students and high school graduates continues to rise but the number of enrolled students at UT remains relatively the same.[6] UT Austin has carefully navigated these circumstances as it seeks "'to provide

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[5] Lindsay Daugherty, et al., *The Texas Top Ten Percent Plan's Impact on Enrollment*, EDUCATIONNEXT (Summer 2014) http://educationnext.org/texas-ten-percent-plans-impact-college-enrollment/ ("The difference in earnings between college graduates and nongraduates has risen in recent decades, and research indicates that attending selective colleges yields a larger economic return than attending less-selective institutions. The benefits of attending a selective college appear to be especially large for lower-income black and Hispanic students."); *see also* SJA 156a (noting 29,501 freshman applications).

[6] Amicus IDRA is well aware that the courts do not allow universities to use demographics to racially balance admissions. *Fisher I*, 133 S. Ct. at 2420. However, these figures are highly relevant to assist the Court in contextualizing the issue as Petitioner has sought to misconstrue various data figures.

that atmosphere which is most conducive to speculation, experiment, and creation,'" and this in turn leads to the question of "who may be admitted to study." *Fisher I*, 133 S. Ct. at 2418 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in judgment)).

Texas pursues this diversity knowing that over the past two decades, Texas has experienced tremendous overall student growth in grades PK-12, especially among Latino students who now comprise a majority of public school students, but also an increasing number of Asian and African-American students. According to public data, during the 1997-98 school year, Texas public schools enrolled 3,891,877 students, including: 14.4% African-American, 45% white, 37.9% Latino, and 2.4% Asian-American.[7] Ten years later, enrollment increased by nearly 800,000 students to 4,651,516, including: 14.3% African-American, 34.8% white, 47.2% Latino, and 3.4% Asian-American.[8] This potentially stands as a tremendous asset for Texas and the Nation as these racially diverse students and their peers prepare to

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[7] TEX. EDUC. AGENCY, ACADEMIC EXCELLENCE INDICATOR SYSTEM, 1997-98 STATE PROFILE REPORT (1998), http://ritter.tea.state.tx.us/perfreport/aeis/98/state.html. The State AEIS Reports (hereinafter, (Year) State AEIS Report) referenced in this brief can be accessed by year here: http://ritter.tea.state.tx.us/perfreport/aeis/. In this amicus brief, IDRA mostly presents Texas data for the school years from the *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) era through 2008, the year Fisher was denied admission to UT.

[8] 2007-08 State AEIS Report, *supra* note 7.

enter postsecondary education and the global workforce.

In this ten-year span, the Latino enrollment accounted for the vast majority of growth, increasing by nearly 50%, from 1,476,008 (1997-98) to 2,193,345 (2007-08); Asian-Americans grew nearly 60% from 95,038 to 158,806; and African-Americans' growth rate neared 20%, increasing from 559,708 to 663,705.[9] However, the white student enrollment *fell* by over 130,000 students from 1,750,561 to 1,619,426.

As should be expected with growth of diversity in the overall student population, the faces of Texas high school graduates have also changed over time to reflect a far more racially and ethnically diverse group of future workers and leaders. The table below shows that of the 197,186 graduates in the Class of 1998, white graduates accounted for over one out of every two graduates. Ten years later, as the number of white graduates grew by over 8,000 students, the white percentage of overall graduates plummeted by over eight percentage points. Conversely, the Latino graduates accounted for just 30% of graduates in 1998 but grew to nearly 48% of all graduates ten years later. The number of African-American graduates, like white graduates, also increased by over 8,000, and Asian-American graduates had a growth rate exceeding 50% over this period.

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[9] 1997-98 State AEIS Report, 2007-08 State AEIS Report, *supra* note 7.

Number and Percent of Texas Public High School Graduates and Freshman Admits by Race/Ethnicity, 1998, 2004, and 2008[10]						
	c/o 1998	1998 Fall Admits	c/o 2004	2004 Fall Admits	c/o 2008	2008 Fall Admits
African-American (% of overall student pop.)	25,165 12.8%	401 3%	33,213 13.6%	569 5%	33,873 13.4%	728 6%
White, Non-Latino	104,792 53.1%	7,659 64%	116,497 47.7%	6,814 58%	112,983 44.8%	6,582 52%
Latino	60,362 30.6%	1,620 14%	85,412 35.0%	1,911 16%	94,571 37.5%	2,621 20%
Asian-American	6,263 3.2%	1,942 16%	8,304 3.4%	2,013 17%	9,750 3.9%	2,309 18%
Total Graduates/ Admits	197,186	11,975	244,165	11,788	252,121	12,843

Despite these tremendous growth rates in the overall minority student population and the composition

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[10] 1998 State AEIS Report, 2004 State AEIS Report, 2008 State AEIS Report, *supra* note 7.

of Texas public high school graduates, the pipeline into universities like UT for minority students remained challenging, as shown in the table above. In 2004, the year before UT added race to the list of factors considered under its personal achievement index, Latino students comprised only 16% of all admits and African-American students only 5%.[11] These were only marginal increases over the *Hopwood* figures[12] and paled in comparison to the growth rate increases over this same time period for minority high school graduates. As the table above shows, for the Class of 2004, African-American students comprised nearly one out of every seven high school graduates but only one out of 20 admits into UT. Latino students accounted for over one out of every three high school graduates, but only one out of every six admits. In contrast, white non-Latino students made up nearly one out of every two high school graduates but 58% of all admits and Asian-American students were one out of every thirty-three graduates but over one out of every six (17%) freshman admits to UT.

Following UT's inclusion of race in 2005, the number and percentage of African-American, Latino, and Asian-American students admitted to UT each

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[11] *See* SJA 156a.

[12] It is important to note that while comparisons between present-day figures and pre-Hopwood figures help contextualize some of the issues, there is no evidence that the pre-*Hopwood* figures ever reflected a critical mass of Latino and African-American students even at that time.

increased through 2008. The number of white student admits decreased over this same period of time by over two-hundred students, but so too did the number of white high school graduates in Texas decline by over 3,500 students.

Yet, despite the dip in the number and percentage of white high school graduates in Texas, white students continued to hold an edge in the admission process over Latino and African-American students. In 2009, IDRA conducted an analysis of the probability of admission into UT between 1998 and 2008 for African-American, Latino, white, and Native American students.[13] The analysis showed that due to the increasing number of applications to UT, the probability for all groups fell over the ten-year period.[14] Nevertheless, white students continued to have a greater chance for admission into UT over the other student groups followed by Latino students.[15] African-American students had the lowest chance of being admitted for each year studied.[16] These demographic trends and related figures show that UT still has a considerable ways to go to ensure that African-American

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[13] The formula used was: Overall Admission Rate for the Academic Year times (the number admitted for a particular group/number applied of the same group). *See* IDRA, *Analysis of Minority Student Access to the University of Texas at Austin, 1998-2008* (May 2009), http://www.idra.org/images/stories/Access%20Index%20Key%20Findings%20May%202009.pdf.

[14] *Id.*

[15] *Id.*

[16] *Id.*

and Latino students have equitable access to the flagship university, with all the fruits that it bears. Texas PK-12 schools are now majority minority, and Latino and African-American student access and success at institutions like UT are keys to economic competitiveness.

However, this does not mean that UT's blended admissions plan is not moving toward its goal of a critical mass and is not narrowly tailored. As noted above, the overall percentages of African-American and Latino students admitted into UT increased since UT added race as part of its holistic admissions factor beginning in the 2005 school year. And, this increase occurred despite an increasing number of TTP graduates having sought admission into UT, thus leaving fewer spots for non-TTP admits. It is a complex matter that UT is attempting to address with one eye on its diversity mission as a public flagship university and one eye on the constitutional standard, seeking to ensure the nation's future leaders developed at UT are "trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues." *Bakke*, 438 U.S. at 312 (Powell, J.); *see* JA 253a, 407a, 415a-16a, 478a-79a (discussing mission and duty as public flagship).

II. Latino and African-American Students Often Attend Under-Resourced Schools and Underperform in Academic College-Ready Metrics, but Many Remain Resilient and Competitive

A. The State of Texas has a terrible history of underfunding its PK-12 schools, particularly those concentrated with minority students

For nearly five decades, advocates have led a campaign in the Texas Legislature and in the courts to acquire more equitable resources for minority students and their schools.[17] Despite a handful of court cases forcing the state to provide more equitable opportunities and resources to all of its students, Texas continues to offer largely a dual system of education for the "haves" and "have nots." *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *Edgewood v. Meno*, 917 S.W.2d (Tex. 1995); *Edgewood v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Edgewood v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Tex. Taxpayer & Student Fairness Coalition v. Williams*, No. D-1-GN-11-003130, 2014 WL 4254969 (Tex. App. – Travis Aug. 2014) ("*Texas Taxpayer*"). In the latest school finance case, following a trial of nearly four months, the state district court issued a stinging indictment of the Texas school

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[17] *See, e.g.*, José A. Cárdenas, *Texas School Finance Reform: An IDRA Perspective* (1997).

finance system in holding the system unconstitutionally inadequate and inequitable, particularly for its most challenging students, etched in 364-pages of single-spaced findings of fact and conclusions of law. *See Texas Taxpayer*, 2014 WL 4254969, at *7, *9-11. In holding the system unconstitutional, the court stated: "[r]ather than attempt to solve the problem, the State has buried its head in the sand, making no effort to determine the cost of providing all students with a meaningful opportunity to acquire the essential knowledge and skills reflected in the state curriculum and to graduate at a college and career-ready level." *Id.* at *9. The court noted the testimony of former Texas state demographer Dr. Steve Murdock who testified that the future socioeconomic well-being of Texas will depend largely on how successfully Texas schools educate their growing populations of economically disadvantaged, ELL, and Hispanic students and close those performance gaps. *Id.* at *17. The trial court further found that "if existing gaps in educational attainment levels and household income remain in place between the white population and the Black and Hispanic populations, Texas' population will have substantially lower incomes (with a decline of $7,759, or 11.6% in mean annual household income from 2010 to 2050 in constant dollars) and a higher rate of poverty (increasing from 14.4% in 2010 to 17% in 2050)." *Id.* at *17 (Finding of Fact #19). On the other hand, if minorities can access higher education levels, that will lead to "higher income for all racial/ethnic groups and [ ] higher levels of education can

reduce the differences in income disparities between majority and minority populations." *Id.*

Although many of these cases are fought by low-property-wealth school districts, these districts tend to enroll sizable percentages of Latino and African-American students. IDRA's analysis in the latest Texas school funding case, *Texas Taxpayer & Student Fairness Coalition v. Williams*, found that Texas' 100 wealthiest and 100 poorest school districts have vastly different racial and ethnic concentrations with the wealthiest enrolling about 54% white students and 32% Latino students compared to the poorest enrolling only 7% white students and 91% Latino.[18] An analysis of school districts by decile showed that the wealthiest 102 districts had, on average, access to well over $1,000 more per child than the poorest districts while taxing their residents' property nine-cents less.[19] IDRA also found that low-income and minority students in Texas are more likely to be educated in under-resourced schools with limited access to quality teaching and curriculum.[20] This is not unexpected given the trial court's finding that "schools

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[18] Albert Cortez, *Report of the Intercultural Development Research Association Related to the Extent of Equity in the Texas School Finance System and Its Impact on Selected Student Related Issues Prepared for the Mexican American Legal Defense and Educational Fund*, at 1, 11 (Aug. 2012), http://www.idra.org/images/stories/IDRA_School_Finance_Equity_Report_08162012.pdf.

[19] *Id.* at 15.

[20] *Id.* at 2.

serving predominantly low income and minority populations must pay a higher price to recruit and retain comparable numbers of teachers with comparable qualifications" yet those schools typically receive fewer resources – impacting their quality of education.[21] *See Texas Taxpayer*, 2014 WL 4254969, at *90. And this trend of insufficient resources and unequal opportunities likely will not change given the substantial, historical structures in place that largely obstruct such needed reforms.[22] Notwithstanding the lack of resources in their schools, many minority

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[21] Several research studies show that money can indeed make a difference in student achievement and student outcomes, debunking the myth that "money does not matter" in education. *See, e.g.*, C. Kirabo Jackson, et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes*, at 3-5 (Nat'l Bureau of Econ. Research, Working Paper No. 20118, 2014) ("Jackson Report") (40-year longitudinal study in 28 states showing a significant causal relationship between school funding and improvements in long-term educational outcomes); David Card and A. Abigail Payne, Abstract, *School Finance Reform, the Distribution of School Spending, and the Distribution of Student Test Scores*, 83 J. Pub. Econ. 49, 499 (2002) (concluding that court declarations holding school finance systems unconstitutional "increased the relative funding of low-income districts," which led to "a narrowing of test score outcomes").

[22] *See, e.g.*, James D. Anderson, *A Long Shadow: The American Pursuit of Political Justice and Education Equality*, ELEVENTH ANNUAL BROWN LECTURE IN EDUCATION RESEARCH, EDUCATIONAL RESEARCHER, at 319 (August/September 2015) (concluding that acts by the states, Congress, and the courts dating back to the Reconstruction Era and continuing through the present have disenfranchised minorities and impeded their access to equal educational opportunities).

students endure on the unequal playing field, taking advantage of all the opportunities in front of them. They make themselves as competitive as others on the whole while developing key traits of grit and determination that help them contribute to diverse educational settings in college.

B. Texas' failure to invest sufficient resources in its promising Latino and African-American students results in those students struggling on the one metric preferred by Fisher: the SAT

Despite UT's consideration of several factors in determining whether a student is admitted, in her complaint, Petitioner latches on to slight differences in SAT scores between her 2008 SAT score and the average SAT scores for non-TTP Latino and African-American students enrolled students at UT for the year 2006. *See* JA at 91a, 109a. Not surprisingly, this lone "race-neutral" metric tends to have a disparate impact on African-American and Latino students, who often lack resources in their schools to help adequately prepare them for the SAT (*see Texas Taxpayer*, 2014 WL 4254969, at *47-48), though many persevere and still perform quite well on the SAT.

Gaps in SAT scores among minority and majority students, similar to gaps in access to PK-12 resources, have persisted over the years. For the Class of 1996, the state mean SAT score was 993; 1066 for Asian-American; 1043 for white; 908 for Latino; and

852 for African-American students.[23] In 2008, the state mean SAT score was 987 for the Class of 2008; 1100 for Asian-American; 1060 for white; 897 for Latino; and 855 for African-American.[24]

C. Some African-American and Latino Students Persevere and Perform Competitively on the SAT

Despite the challenges facing many African-American and Latino students on the SAT, their determination persists and both groups are taking the SAT at increasing rates. For the Class of 1996, less than one out of every two Latino students took the SAT (48.8%); three out of five African-American students (60.1%); seven out of every ten white students (71.1%); and six out of every seven Asian-American students (86.9%).[25] Twelve years later, as the population of Latino students increased significantly, the rate of Latinos taking the SAT for the Class of 2008 climbed to 52.2%; African-American students jumped ahead of white students at 72.2%; white students dipped slightly to 70.6%; and Asian-American students increased to 89.6% students.[26] These figures demonstrate that minority students show an increasing

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[23] 2004-05 State AEIS Report, *supra* note 7.

[24] 2008-09 State AEIS Report, *supra* note 7.

[25] 2006-07 State AEIS Report, *supra* note 7.

[26] 2008-09 State AEIS Report, *supra* note 7.

interest in attending college, despite their underperformance on the exam.

Although African-American and Latino students seemingly struggle on average on the SAT, the results at UT show that many of these minority students do quite well on the SAT and must perform at higher or similar levels than their peer group averages compared to white students. As the table below shows, the average SAT score for Latinos entering UT as freshmen admitted outside of the TTP in 2008 was 1211, compared to a state mean SAT score for Latinos of 897 – a difference of 314 points. African-American students entering UT outside of the TTP also scored much higher than their statewide peers, averaging 1087 compared to a statewide African-American mean of 855 – a difference of 232 points. White students entering outside of the TTP averaged 1300 on the SAT – 240 points above the statewide white average of 1060.

Differences in SAT Mean Scores Among Racial/Ethnic Groups: High School Class of 2008 and Freshman UT Entering Freshmen, 2008[27]			
	White	Latino	African-American
UT Non-TTP Admits	1300	1211	1087
Class of 2008	1060	897	855
Difference in % Points	240	314	232

Of course, SAT scores are merely one metric among many for students seeking admission into UT. They fail to tell the whole picture of a student and the attributes that may contribute to the benefits of a more diverse learning environment, including "enhanced classroom dialogue and the lessening of racial isolation and stereotypes." *Fisher I*, 133 S. Ct. at 2418. Furthermore, an increasing number of higher education institutions continues to question the utility of college entrance exams scores, like the SAT, in predicting college success and choose to either no longer require the SAT/ACT for admission purposes or de-emphasize its weight.[28] One of the more recent

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[27] 2008-09 State AEIS Report, *supra* note 7; *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (Oct. 2009), at 12-13, https://www.utexas.edu/student/admissions/research/admission_reports.html.

[28] *See, e.g.*, *New Survey Shows Record Number Of Colleges And Universities Dropped ACT/SAT Exam Score Requirements In Past Year*, FAIRTEST (Apr. 29, 2015), http://www.fairtest.org/new-survey-shows-record-number-colleges-and-univer.

and more extensive studies published in 2014 showed that high school grade point averages (GPAs) were better predictors of college success compared to SAT scores.[29]

This does not mean that the TTP law – by relying on GPAs – fulfills the greater interest of UT in realizing the benefits of a diverse student body, because, as stated earlier, the compelling interest in diversity recognized by this Court "encompasses a far broader array of qualifications and characteristics." *Fisher I*, 133 S. Ct. at 2418 (citing *Bakke*, 438 U.S. at 315). However, such research does help dispel Fisher's notion that her SAT scores make her more qualified than the African-American and Latino students admitted with lower SAT scores than her.[30]

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[29] *See, e.g.*, William Hiss & Valerie W. Franks, *Defining Promise: Optional Standardized Testing Policies in American College and University Admissions*, at 3 (2014), http://www.nacacnet.org/research/research-data/nacac-research/Documents/DefiningPromise.pdf ("College and university Cumulative GPAs closely track high school GPAs, despite wide variations in testing. Students with strong [high school] GPAs generally perform well in college, despite modest or low testing. In contrast, students with weak [high school] GPAs earn lower college cumulative GPAs and graduate at lower rates, even with markedly stronger testing.").

[30] Rachel Godsil, et al., *Addressing Implicit Bias, Racial Anxiety and Stereotype Threat in Education and Healthcare*, SCIENCE OF EQUALITY, at 11 (2014), http://perception.org/app/uploads/2014/11/Science-of-Equality-111214_web.pdf ("Conventional measures of academic performance underestimated the ability of members of stereotyped groups by 0.17 standard deviations or 62 points on the SAT.").

In fact, Fisher's SAT score of 1180 was 31 points *lower* than the average Latino score for non-TTP entering freshman at UT, raising the question of just how is Petitioner able to pursue her case under such a tenuous record.[31]

III. Pretending Race Does Not Exist in Holistic Review Disparately Harms Latino and African-American Students, Who Also Tend to be Subjected to Discipline and Mobility at Greater Rates than White Students

A. Student Discipline Disparately Impacts Minority Students

Although no one could plausibly argue that students in elementary and secondary schools should not be held accountable for their actions and should not be reasonably disciplined when warranted, the practice of schools and educators subjecting African-American and Latino students to a range of disciplinary actions at far greater rates than white students raises serious questions about equal opportunity and equal treatment. Like minority students who persevere in under-resourced schools, minority students subjected to unfair and unequal student discipline practices – or those educated in environments where such practices exist – can develop strong learning and

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[31] *See* JA 91a (Petitioner's score); *supra* note 27 (noting Latino SAT average scores for entering freshmen in 2008); *see also infra* at Section V (challenging Fisher's standing).

personality attributes that would help them present different perspectives that are valuable at universities like UT.

When students are disciplined, they often lose learning time and the quality of their teaching environment may also suffer.[32] An IDRA study of referrals to Disciplinary Alternative Education Programs ("DAEPs") in Texas found that total referrals had increased by over 35,000 eleven years following the adoption of DAEPs in 1995.[33] Of these students, African-American students were overrepresented in the early elementary school years and Latino students were overrepresented in the secondary school years.[34] A 2011 study of broader disciplinary actions taken against students in Texas concluded that far fewer white male students (59%) had at least one discretionary violation compared to African-American

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[32] One study of suspension rates estimated that in the 2011-12 school year, "U.S. public school children lost nearly 18 million days of instruction" from student suspensions alone. Dan Losen, et al., *Are We Closing the School Discipline Gap?*, UCLA CIVIL RIGHTS PROJECT, at 1 (2015), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap.

[33] Albert Cortez, *Disciplinary Alternative Education Program Referrals in Texas, A 2009 Update* 11, IDRA (Mar. 2009) http://www.idra.org/images/stories/IDRA%20DAEP%20Policy%20Update%20March%202009.pdf. And the nature of the offenses for which these students were referred to DAEPs was minor: four out of five referrals were not due to serious offenses. *Id.* at 6.

[34] *Id.*

male students (83%) and Latino male students (74%), and similar racial and ethnic disparities were found among female students.[35]

The over-identification of African-American and Latino students for disciplinary action is especially concerning as research suggests that educators may be wrongly exercising implicit bias[36] in disciplining minority students.[37] The stark disparities between white and African-American and Latino students for discretionary referrals such as "disrespect" or "loitering" raise questions about teacher perceptions of minority students.[38] An ethnographic study found that

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[35] Tony Fabelo, et al., *Breaking Schools' Rules, A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, JUSTICE CENTER THE COUNCIL OF STATE GOVERNMENTS, AND PUBLIC POLICY RESEARCH INSTITUTE (July 2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf. The researchers further found that African-American students were 31% more likely to be subject to a school discretionary action, compared to otherwise identical white students, after controlling for 83 different variables in isolating the effect of race alone on disciplinary actions.

[36] In its simplest terms, "implicit bias" refers to "embedded stereotypes that heavily influence our decision-making without our conscious knowledge." Godsil, *supra* note 30, at 3.

[37] *See, e.g.*, Cheryl Staats, *Implicit Racial Bias and School Discipline Disparities: Exploring the Connection* (May 2014), http://kirwaninstitute.osu.edu/initiatives/school-discipline (discussing several underlying reasons supporting the connection between implicit bias and disparate minorities' rates of student discipline).

[38] Godsil, *supra* note 30, at 11, 34 (citing study finding that African-American and Latino students were less likely than white students to be assigned to detention or other moderate

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minority students disproportionately received referrals leading to school suspensions that largely resulted from violations "in which a student was seen as calling into question established classroom practices or the teacher's authority."[39] Other research shows that teachers' general negative stereotypes of students of minority students may impact teacher expectations and their measuring of student performance.[40]

Disciplinary referrals, including in-school suspensions, out-of-school suspensions and expulsions, have been shown to negatively impact student achievement and student outcomes.[41] A 2011 study of nearly one million Texas student records found that of all students suspended or expelled, 31% repeated their grade at least once compared to only 5% of students

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discipline measures but far more likely to be suspended or expelled for minor infractions in elementary schools – four times as likely for African-Americans and two times as likely for Latinos).

[39] *See id.* at 35-36.

[40] *See id.* at 37.

[41] Losen, *supra* note 32, at 1-2 (noting impact of high suspension rates on graduation rates, rates of juvenile crime and delinquency, voter disenfranchisement, degradation of health and culture, and a shorter life expectancy); *see also* U.S. DEP'T OF EDUC., *School Climate and Discipline: Suspension 101* (last modified Oct. 15, 2015), http://www2.ed.gov/policy/gen/guid/school-discipline/index.html ("Suspensions are associated with negative student outcomes such as lower academic performance, higher rates of dropout, failures to graduate on time, decreased academic engagement, and future disciplinary exclusion).

with no disciplinary action.[42] Approximately 10% of students suspended or expelled in grades 7-12 dropped out. *Id.* The 2009 IDRA study referenced earlier analyzed student achievement on Texas' standardized test, finding that in 2005-06, DAEP-referred students passed the state math test at 31 percentage points *lower* than the state average of 65% and the reading test 13 percentage points lower than the state average of 86%.[43] This is not surprising given that students subject to discipline are often taken out of the normal class setting and suspended and expelled students miss school altogether for at least a period of time.

Although the cards are stacked up against minority students subject to discipline, some students persevere and should be given a fair chance to continue their education. The fortitude and resolve brought by minority students who may have been unfairly disciplined and fall out of the TTP, yet who continue to compete, are among the several types of minority students who should get a fair review of their whole record due to their unique experiences and contributions, but who may not get such if Petitioner prevails. *See Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 660 (2014) ("*Fisher II*") (recognizing interest to "search for students with a range of skills, experiences, and performances – one that will be impaired by turning a blind eye to the differing opportunities offered by the schools from whence they came").

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[42] Fabelo, *supra* note 35.

[43] Cortez, *supra* note 33.

B. Mobility Disparately Impacts Minority Students and Academic Performance

Student mobility[44] can also reflect the inability of PK-12 schools to serve students who are both minority/poor and mobile, resulting in the under-preparation and underperformance of minority students.[45] While students may move from one school to another for one of many reasons,[46] African-American and Latino students are more likely than white students to change schools.[47] For example, student

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[44] For purposes of this brief, the term "mobility" generally refers to students who change schools other than for promotional purposes. *See* Russell W. Rumberger, *The Causes and Consequences of Student Mobility*, THE JOURNAL OF NEGRO EDUCATION, Winter 2003, at 7. For more specific Texas references, "mobility" refers to students who were enrolled in a school less than 83% of the school year (i.e., has missed six or more weeks at a particular school). TEX. EDUC. AGENCY, 2013-14 TEXAS ACADEMIC PERFORMANCE REPORT 17 (2014) http://ritter.tea.state.tx.us/perfreport/tapr/2014/glossary.pdf.

[45] Changing schools for nonpromotional reasons cannot only negatively impact students academically, but also socially and psychologically. *See* Rumberger, *supra* note 44, at 8.

[46] *See id.* at 6 (citing residential changes as the main reason for student mobility but also overcrowding, class size, student suspension and expulsion, school choice and the academic and social climate of a school).

[47] TEX. EDUC. AGENCY, *A Study of Student Mobility in Texas Public Schools, Statewide Texas Educational Progress Study Report No. 3 and Supplementary Data Report No. 3A*, (1997), http://files.eric.ed.gov/fulltext/ED424664.pdf. The research also shows that white students tend to move out of a school district altogether while minority students merely change schools within a district. *See id.* at 10, 44 (finding that white students who do

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data from the National Assessment of Educational Progress, NAEP, showed that 45% of Latino students and 41% of African-American 4th grade students had changed schools in the previous two years compared to only 27% of white students.[48] Mobility is especially high among large, predominantly minority, urban school districts. *Id.*

The academic impacts related to student mobility range from decreased student performance on standardized test exams and grades, to increased grade-retention rates and lower graduation rates. *Id.* at 7. A 2006 study of student achievement data in a high Latino student district found a significant difference in the highly mobile student group on the Texas Assessment of Knowledge and Skills (TAKS) between the 5th and 6th grade.[49] Another study cited by a committee examining the impact of mobility on student achievement found that mobility contributed to approximately 15% of the achievement gap between white and African-American students by grade seven.[50] TEA's 1997 study of student performance on

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move schools are more likely to move across school district lines rather than within a district); Rumberger, *supra* note 44, at 10.

[48] *See* Rumberger, *supra* note 44, at 6.

[49] Alfred Lynn Pulliam, Abstract, *The Impact of Student Mobility on School Accountability in Texas* (2007), https://baylor-ir.tdl.org/baylor-ir/bitstream/handle/2104/5028/alfred_pulliam_edd.pdf?sequence=1.

[50] Alexandra Beatty, National Research Council and Institute of Medicine, *Student Mobility: Exploring the Impact of*

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the state standardized test at that time, the Texas Assessment of Academic Skills (TAAS), concluded that there were significant relationships between student mobility and academic performance and that mobile students scored lower on the tests than non-mobile students and the relationship between mobility and achievement strengthened in schools with high mobility.[51]

Student mobility also has been found to not only impact the individual student but also campus and school district performance. The 1997 TEA study referenced above found student mobility related to both lower campus and district accountability ratings under the Texas accountability systems.[52] Other studies have determined similar results.[53]

Frequent Moves on Achievement: Summary of a Workshop (2010), http://www.nap.edu/read/12853/chapter/1#ii.

[51] TEX. EDUC. AGENCY, *A Study of Student Mobility in Texas Public Schools, Statewide Texas Educational Progress Study Report No. 3 and Supplementary Data Report No. 3A*, (1997), http://files.eric.ed.gov/fulltext/ED424664.pdf (noting Texas study of Austin Independent School District (AISD) where low-income, African-American, and Hispanic students were more likely to be mobile than their middle-income or white peers and finding a negative relationship between student mobility and student achievement).

[52] *Id.*

[53] *See, e.g.*, Ray Alvarez, *The Effect of Mobility on Texas Assessment of Knowledge and Skills Test Scores*, DISSERTATION WILLIAM HOWARD TAFT UNIVERSITY, at 79 (2006), http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/e5/4e.pdf (finding student mobility impact achievement scores

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The disparate impact of mobility on minority students, though a barrier to fully preparing students to reach their full potential, should not be perceived to be a negative attribute. The fact that these students may have survived adversity from having to change schools from one year to the next, or even during the same year, is highly relevant to judging an applicant for admission into UT in the whole. These mobile, minority students may have gone from school leaders to school followers, or from being in the top ten percent to being a top quartile student as a result of the transfer (or vice versa). From these experiences, some minority students may move from majority-minority schools to majority white schools, or vice versa. The challenges they face as a result of having changed schools could help build their character beyond metrics captured solely in test scores and GPAs. This is precisely why well-trained university professionals like those admission officers at UT are in a much better position to fairly judge the individual experiences of all students, including resilient, minority students who were forced to change schools and the role that race may have played. Their different experiences in being able, or unable, to adapt to the changed learning environments could bode well for the university, helping to diversify perspectives, promote lively debates, promote cross-racial understanding and break down racial and

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of districts); Beatty, *supra* note 50 (noting study that found effects of mobility on schools to be "quite large").

ethnic stereotypes as envisioned by UT. JA 415a-16a, 478a-79a.

C. Latino and African-American Student Achievement Persists, Despite Higher Dropout and Attrition Rates

The conflation of numerous factors, including but not limited to disparate discipline referrals, student mobility, and insufficiently resourced schools, can lead to schools forcing several African-American and Latino students to drop out prior to graduating high school, diminishing their future potential. For the Class of 2008, for example, African-American students dropped out at three times the rate of white students, 16% versus 5%.[54] Latino students did not fare much better with 14% dropping out. *Id.* Although these rates are quite sizeable, Texas is likely underreporting its true dropout rates for all students and its reporting remains the subject of contentious debate.[55]

IDRA's annual attrition study, which remains unchanged since its inaugural year in 1985-86, offers a related but methodologically different analysis of school holding power by examining ninth grade

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[54] *See* 2008-09 State AEIS Report, *supra* note 7.

[55] Terrence Stutz & Holly Hacker, *Critics scrutinize Texas' unusual high school dropout rates*, DALLAS MORNING NEWS (Aug. 29, 2015), http://www.dallasnews.com/news/education/headlines/20150829-critics-scoff-at-texas-high-school-dropout-rates.ece.

enrollment figures in a given school year and comparing 12th-grade enrollment figures three years later, adjusting the expected grade 12 enrollment based on increasing or decreasing enrollment in grades 9-12.[56] In 2008, African-Americans had a state attrition rate of 38%, Latino students at 44%, and white students at 18%.[57] In other words, Texas public schools reported 38% fewer African-American students in Grade 12 compared to three years prior in Grade 9.[58] The stark differences in dropout and attrition rates between African-American and Latino students and white students further reflect systematic challenges for minority students. Thousands of these minority students never graduate from high school, much less graduate college- and career-ready.

Despite these dismal dropout rates for Latino and African-American students, UT's admission rates for the minority students who were able to achieve in the classroom went up since the inclusion of race into its admissions plan. For those minority students who overcome the several challenges they face from student mobility, unfair discipline and under-resourced

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[56] Roy L. Johnson, *Texas Public School Attrition Study, 2013-14*, IDRA, at 7 (Oct. 2014), http://www.idra.org/images/stories/IDRA_Attrition_Study_2014.pdf.

[57] *Id.* at 8.

[58] The attrition rates have decreased over the years for all student groups but still remain quite high for African-American students (25%) and Latino students (31%), compared to white students (13%) in 2013-14. *Id.*

school and do graduate ready for college, UT is well within its right to consider their race and related experiences in holistically weighing their application for admission. *See Fisher I*, 133 S. Ct. at 2418 ("Part of 'the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation,' and this in turn leads to the question of 'who may be admitted to study.'" (citations omitted).

IV. The Limited Consideration of Race for Resilient Latino and African-American Students Outside of the Top Ten Percent Helps UT Fulfill Its Diversity Mission

As described above, the state of public education for Latino and African-American students, is very challenging – to say the least. However, this does not mean that minority students are any less deserving of entering the pipeline of future success and leadership opportunities that universities like UT offer. Indeed, for those minority students failing to rank in the top ten percent of their class but still graduating with a strong academic record, their resilience and fortitude are the precise personal qualities that would lend well to the college environment and allow for "enhanced classroom dialogue and the lessening of racial isolation and stereotypes." *Fisher I*, 133 S. Ct. at 2418.[59] Their race and related experiences remain

[59] Although Petitioner claims (erroneously) that UT seemingly favors some non-TTP minority students attending self-described

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highly relevant. As Justice Kennedy noted, "the enduring hope is that race should not matter; the reality is that too often it does." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring).

The broad student diversity envisioned by the courts and UT also does not simply end with those students overcoming significant challenges in high-minority and low-resourced schools but also extends to students educated in diverse PK-12 schools. Minority students educated in more racially and ethnically integrated schools accrue certain benefits from their experiences in more diverse settings that may also help contribute insightful perspectives in the university classroom and campus. Studies have shown that

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"integrated" schools as more favorable than TTP students attending self-described "segregated" schools (*Fisher II*, 758 F.3d at 650-653), and Petitioner attacks the absence of a record supporting such (Fisher Br. at 17-18), the Court need not reach that issue because it is irrelevant. Indeed, such arguments merely inflame the policy debate between the quality of TTP students and non-TTP students, which is ill-fit for the briefing in this case. *Compare* Rebecca Leung, *Is the "Top Ten" Plan Fair*, 60 MINUTES (Oct. 15, 2004), http://www.cbsnews.com/news/is-the-top-10-plan-unfair/ (goading a minority TTP female student into questioning whether she deserved admission into UT Austin over a student from a "high performing" school). What matters is whether UT Austin's pursuit of diversity must be relegated to the TTP or whether the University may examine applicants more holistically and include race as one of those factors in its pursuit of a broader definition of diversity; the latter, of course, has already been upheld. *See Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

interracial student contact in desegregated schools may result in students socializing with one another between races.[60] Intergroup contact among minority and white students is also related to lowering prejudice between racial groups.[61] Schools that are racially integrated are also found to help improve workplace production in an increasingly diverse work setting.[62] Diverse, integrated school settings further reflect "more robust classroom discussions, the promotion of critical thinking and problem-solving skills and higher academic achievement."[63]

Indeed, UT may consider the beneficial aspects of any applicant's race under the holistic admissions plan, including Anglo and Asian-American applicants. *See Fisher II*, 758 F.3d at 659. This is important as the benefits of diverse school settings have been found to connect with positive learning outcomes for white students as well.[64]

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[60] *See* Linda R. Tropp, et al., *The Use of Research in the Seattle and Jefferson County Desegregation Cases: Connecting Social Science and the Law*, ANALYSES OF SOCIAL ISSUES AND PUBLIC POLICY, at 107 (2007).

[61] *Id.* at 107.

[62] Genevieve Siegel-Hawley, Research Brief, *How Non-Minority Students Also Benefit from Racially Diverse Schools*, THE NATIONAL COALITION ON SCHOOL DIVERSITY (Oct. 2012), http://www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf.

[63] *Id.* at 1-2.

[64] *See generally* Hawley, *supra* note 62 (describing several academic and social benefits of high quality, integrated school settings for white students); *see also* Gary Orfield & Erica

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UT's pursuit of a critical mass of Latino and African-American students can reflect a broad range of experiences and should not be relegated solely to the TTP students, as non-TTP minority students may equally and individually bring tremendous attributes based on their diverse educational experiences.[65] *See Bakke*, 438 U.S. at 324 (discussing Harvard Plan whereby the university's interest in diversity would be served well by both a high performing, affluent African-American applicant as well as a lower performing, poor African-American who succeeded in his environment). Under Petitioner's admissions plan, those experiences would be entirely irrelevant and the universities would need to concentrate on other

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Frankenberg, *Experiencing Integration in Louisville: How Parents and Students See the Gains and Challenges* at 15, 18, UCLA CIVIL RIGHTS PROJECT (2011), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/experiencing-integration-in-louisville-how-parents-and-students-see-the-gains-and-challenges/LOUISVILLE_finalV3_12711.pdf (reviewing a study of high school students in Louisville, Kentucky that found that three out of four white students educated in diverse classrooms believed that the classroom discussion had at least some impact on their ability to understand different points of view and that their school experiences helped to prepare them to work in diverse settings).

[65] This is not to say that TTP students were not educated in diverse settings, but those students' classroom experiences in social settings may be less relevant to admission officials as they are admitted based on their GPA.

factors that may not reflect the university's compelling interest in diversity.[66]

V. Fisher's Lack of Standing is Troubling and a Ruling in Fisher's Favor Could Open Up Other Groundless Challenges to Constitutionally Enacted Holistic Admissions Plans

If this Court wavers from its precedent and disallows UT from considering holistically the race of applicants for admission purposes, such a ruling would not only defy jurisdictional standing standards but would also potentially open up the door to endless challenges by future opponents of diversity admission plans. In IDRA's Fifth Circuit brief, we raised our concern with the courts lowering the standing bar for litigants like Petitioner in holistic admission cases. *See* Br. of Latino Amici Curiae Supporting

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[66] Indeed, it is perhaps even more important now for UT Austin to consider other experiences and attributes of students beyond test scores due not only to the explosive racial incidents unfolding across the country, but also due to events targeting minority students at UT Austin. *See, e.g.*, Tyler Kingkade, *University of Texas Conservative Students Hold Affirmative Action Bake Sale*, THE HUFFINGTON POST (Oct. 1, 2013), http://www.huffingtonpost.com/2013/10/01/affirmative-action-bakesale_n_4025362.html (reporting that conservative students at UT Austin held a public "affirmative action" bake sale, charging students different rates); Julia Brouillette, *Guests wear ponchos, sombreros and construction gear at "border patrol" fraternity party*, THE DAILY TEXAN (Feb. 9, 2015), http://www.dailytexanonline.com/2015/02/09/guests-wear-ponchos-sombreros-and-construction-gear-at-border-patrol-fraternity-party.

Affirmance, 09-50822 at 3-11. In cases like *Bakke*, because universities included racial quotas for admission and prevented white applicants from competing for those spots, the Court allowed rejected white applicants to proceed without having to show a "fairly traceable connection" between their injury and the challenged action. *See Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 280 n. 14 (1978). Here, there are no quotas but instead, a holistic admissions process that factors in several metrics and student characteristics. App. 121A; JA 381a-82a (no quota). Petitioner competed against minority applicants and all other applicants applying outside of the TTP, including 2,142 white applicants who were admitted into UT outside of the TTP. SJA 170a.

Petitioner's only evidence presented in the lower court below showing that she was harmed was her SAT score, which as noted above was 31 points *lower* than the *average* score for Latino students entering UT outside of the TTP. There were over 100 white students outside of the TTP with SAT scores *below* Petitioner's SAT.[67] Indeed, as reflected by the Fifth

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[67] *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (Oct. 2009), at 12 (showing at total of 139 non-TTP white students with SAT scores below 1190 for entering freshmen in 2008). Although Fisher's score was 1180, of the 81 white students identified with scores below 190, it is reasonably assumed that at least one-half of those students did not score between 1180 and 1190; thus, the figure of "at least 100 white students" is used here. And the number of white students entering UT as freshmen outside of the TTP with lower test scores than Fisher

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Circuit, Petitioner would not have been admitted even if she had maxed out the personal achievement index. *Fisher II*, 758 F.3d at 662. Simply put, there is no evidence that Petitioner would have been admitted *but for her race*. The relaxed standing requirement developed by the Court in *Bakke* was intended to apply in university admissions cases only in quota cases, not in cases like the present where applicants compete for all admission slots and where several factors are considered by the university. Here, Fisher's white race is not enough to establish standing.

In fact, if the court allows this case to proceed on such a thin record, it will encourage future litigants with no evidence of standing to continue their cases in court with nothing more than an application denied. Depending on the groups identified as underrepresented by a university, Latino students could claim African-American students were admitted ahead of them simply because of their higher test scores, or vice versa. Asian-American students could file claiming unqualified white students were offered admission ahead of them, in spite of their higher test scores. Certainly this does not mean that legitimately injured students should not be able to contest intentional racial discriminatory treatment under the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. However, neither should the Courts allow litigants like Petitioner to proceed in

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was greater than the combined non-TTP entering African-American and Latino freshmen with lower test scores than Fisher. *Id.*

court challenging non-quota plans on such a paper thin record of a test score, a rejected application, and nothing more.

This Court has previously held that universities may include in their mission and goals a diverse student body and that universities may pursue that interest through narrowly tailored means. *See Fisher I*, 133 S. Ct. at 2419. UT has committed its non-TTP holistic admissions plan to this very process to ensure it does not overlook qualified Latino and African-American students, while at the same time admitting scores of other qualified white students. It is not the type of plan based on a "forbidden classification [ ] that [ ] demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Parents Involved*, 551 U.S. at 746 (citation omitted). Instead, it is a plan that recognizes a compelling interest in diversity as previously recognized by this Court and that diversity is pursued in a way that judges all applicants based on a "broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Fisher I*, 133 S. Ct. at 2418, (citing *Bakke*, 438 U.S., at 315) (separate opinion).

CONCLUSION

For the above stated reasons, Amicus IDRA supports affirmance of the decision below.

Respectfully submitted,

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